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IN THE

Supreme Court of the United States

October Term, 1964

No. 825

EBER BROS. WINE & LIQUOR CORPORATION,
Petitioner,

v.

THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above-entitled case on October 16, 1964.

Opinion Below

The opinion of the Court of Claims (Appendix B, *infra*, p. 3a) is reported in 337 F. 2d 624.

Jurisdiction

The judgment of the Court of Claims (see Appendix B, *infra*) was entered on October 16, 1964. The jurisdiction of this Court is invoked under 28 U. S. C. §1255(1).

Question Presented

Whether a bill, passed by both houses of Congress, and physically delivered by Congress, in accordance with established practice, to the Office of the President at the Seat of the Government,[1] *was, by such delivery, "presented" to the President within the meaning of Article I, Section 7, Clause 2 of the Constitution,* and so became law when not returned by the President to the Congress within ten days of such delivery (Sundays excepted), Congress not having previously adjourned, when the President had been abroad at the time of the delivery of the bill to his Office and thereafter returned the bill to Congress with a message of disapproval within ten days of his arrival in the United States.

Constitutional Provision Involved

"Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approves he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall

1. U. S. Const. art I, §8, cl. 17.

enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two-thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. *If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.*" U. S. Const. art. I, §7, cl. 2 (italics supplied).

The text of the bill in question, H.R. 2717, 86th Cong., 1st Sess. (1959), is set forth in Appendix A, *infra*.

Statement

This suit was brought by petitioner in the Court of Claims under 28 U. S. C. §1346 and §1491[2] for the refund of income taxes overpaid by petitioner. The respondent asserted the Statute of Limitations as its only defense. (See Answer, Record, pp. 24-25.) That defense had been expressly barred by the terms of H.R. 2717, 86th Cong., 1st Sess. (1959) (see Appendix A, *infra*), passed by both Houses of Congress and delivered to the Office of the President at the White House on August 31, 1959. From

2. Additional statutory bases for the claim are set forth in the Petition below, Paragraph 12 (Record, p. 4).

August 26 to September 7, 1959 the President was out of the country. On September 14, he returned H.R. 2717 to the House of Representatives with a message of disapproval. Congress adjourning at 6:22 a.m. on September 15, the bill was not reconsidered.[3]

Upon these facts the court below found that, if H.R. 2717 was "presented" to the President on August 31, 1959 and consequently became law upon the expiration of ten days (Sundays excepted), "plaintiff is entitled to a refund for the overpayment of income taxes in a total amount of $150,634.18" plus interest (Finding of Fact 4).[4] The court concluded, however, that H.R. 2717 was not "presented", within the meaning of Article I, Section 7, Clause 2 of the Constitution[5] until September 7, 1959, the date of the President's arrival in the United States, and that his return of the bill to the House of Representatives on September 14, 1959 with his disapproval accordingly constituted an effective veto thereof. The court thereupon dismissed plaintiff's suit as barred by the Statute of Limitations.

The sole issue in the case was whether H.R. 2717 was "presented" to the President within the meaning of Section 7 when it was delivered to his Office on August 31, 1959.

1. *The Passage of H.R. 2717.* "A Bill for the Relief of Eber Brothers Wine and Liquor Corporation", H.R. 2717, 86th Cong., 1st Sess. (1959), waiving the Statute of Limita-

3. 105 Cong. Rec. 19688, 19749 (Sept. 14, 1959).

4. The parties have so stipulated. Record, p. 29. The Findings of Fact by the Court of Claims are set forth in Appendix B, *infra*, p. 3a at pp. 21-42, and are cited herein as "Finding ——".

5. Hereinafter referred to as "Section 7".

tions as to petitioner's claim for the refund of an overpayment of income taxes for its fiscal years 1947 and 1948, was introduced in the House of Representatives on January 15, 1959 (Finding 2). The bill was duly referred to the cognizant House Committee, which, having considered a Treasury Department report opposing passage of an identical bill previously introduced (see Record, pp. 16-17), unanimously recommended passage (H. Rep. No. 118, 86th Cong., 1st Sess. (1959)). The House passed the bill on March 17, 1959 (Finding 2). The cognizant Senate Committee likewise unanimously recommended passage (S. Rep. No. 758, 86th Cong., 1st Sess. (1959), reprinted at Record, p. 13), and the Senate passed the bill on August 27, 1959 (Finding 2). The bill was duly enrolled, signed by the presiding officer of the Senate and by the Speaker of the House and sent to the Committee on House Administration for presentation to the President (*ibid.*).

2. *Delivery of H.R. 2717 to the Office of the President.* On August 31, 1959, H.R. 2717, with twelve other bills, was physically delivered to the White House by a clerk of the Committee on House Administration (Finding 6). All thirteen bills were accepted by Mr. Tom Jones, a legislative clerk on the White House staff, who signed receipts therefor in the customary form:

WHITE HOUSE

Washington, D. C.

RECEIVED from the Committee on House Administration of the House of Representatives the following enrolled House Bills:

* * *

(See Findings 5, 6). The procedure thus followed for the delivery and receipt of enrolled bills by Congress to the President—by an agent of the Congress to a legislative clerk of the White House, rather than personal delivery to the President himself—has obtained "at least since 1931, and for some period of time prior thereto, the duration of which is uncertain" (Finding 5). Accordingly, upon the return to the House of Representatives of the White House receipt for H.R. 2717, a notation was made in the House Journal for August 31, 1959 in accordance with the usual practice[6]:

> "MR. BURLESON, from the Committee on House Administration, reported that that Committee did on this day *present to the President for his approval* a bill of the House of the following title:
>
> * * *
>
> "H.R. 2717 * * * A bill for the relief of Eber Brother Wine and Liquor Corporation * * *." (italics supplied).[7]

The Journal for August 31, 1959, containing this notation, was read and formally approved by the House the following day. See 105 Cong. Rec. 17539 (Sept. 1, 1959).

3. *The Expiration of Ten Days (Sundays Excepted) without Presidential Action.* Upon delivery of H.R. 2717 and the twelve other bills to the White House on August 31, they were immediately referred by the President's staff to the Bureau of the Budget and were processed in the normal

6. The House is required to keep a Journal under the Constitution. U. S. Const. art. I, §5, cl. 3.

7. A similar notation appeared in the *Congressional Record* for August 31, 1959 (Finding 6: 105 Cong. Rec. 16022 (Aug. 31, 1959)).

manner in which bills are processed following presentation (Finding 7). H.R. 2717 was returned to the White House with the recommendations of the Bureau of the Budget and the Treasury Department on September 5 (*ibid.*). The other twelve bills were approved by the President on September 8 and September 9, all within ten days following their delivery to the White House. The President, however, took no action on H.R. 2717 until September 14, twelve days (Sundays excepted) after its delivery. At that time he returned H.R. 2717 with a message of disapproval to the House of Representatives (Finding 2), which was then in recess awaiting adjournment.

The Senate being notified later that day that a "veto" message had been received, Senator Keating of New York inquired on the floor of the Senate whether H.R. 2717 had not automatically become law upon the expiration of ten days (Sundays excepted) following its delivery to the office of the President on August 31, 1959. The Presiding Officer of the Senate stated that the question was "for the courts to decide." 105 Cong. Rec. 19553 (Sept. 14, 1959). This colloquy on the Senate floor is set forth in Appendix C, *infra*, pp. 6a-8a.

4. *The President's Absence.* On August 26, 1959, five days before the delivery of H.R. 2717 to the White House, President Dwight D. Eisenhower left the United States for Europe; he was to return on September 7 (Finding 8). On the occasion of an earlier trip abroad to Geneva in 1955, the Attorney General had suggested to the President:

> "that you confer with leaders in Congress so that arrangements can be made under the law for enrolled

bills or joint resolutions *to be held in Congress* until your return.

"In this way, your attention to the important matters raised in Summit Talks will not be diverted by consideration of bills which may safely await your return.

"If Congressional leadership believes that the matter is serious enough to warrant your immediate attention, it should be advised to forward the bill to the White House with this understanding:

1. *That the entries on the House and Senate Journals will carry the statement: 'Delivery to the White House for forwarding to the President.'* " Memorandum of Attorney-General Brownell, July 5, 1955, Plaintiff's Exhibit 3, reprinted in Appendix C, *infra*, page 5a (italics supplied).

Prior to his departure for the trip here in question in August 1959, the President had "indicated his desire" to some unidentified person or persons on his staff that "*so far as possible*, he wanted Congressional bills to be held in Washington until his return"[8] (Finding 17) (italics supplied).

The President's "desire", however, was not implemented in the case of H.R. 2717 by either of the alternative methods proposed by the Attorney General in 1955: it was not held in Congress until the President's return, nor

8. The President's "desire", as thus found by the court, is ambiguous as to the manner in which he desired bills to be held in Washington, or as to what was understood by "so far as possible." Presumably, he meant "so far as possible" under the Constitution. The President might have meant (in accordance with the 1955 memorandum of Attorney-General Brownell (see text immediately *supra*)) that he wished his staff to arrange, "so far as possible", that Congress delay delivering bills to the White House until his return, and thus clearly delay their "presentation" to him.

did the House Journal reflect that its delivery to the Office of the President was "for forwarding" to him.[9] Instead, two of the President's aides, Mr. Gerald Morgan[10] and Mr. William Hopkins[11] "decided that * * * the bills received [by the President's Office] during [the President's] absence should be stamped 'Held for presentation to the President upon his return to the United States' " (Finding 17), "language never before used on prior occasions of Presidential absence from the country" (Finding 8). The legislative clerks on the President's staff were instructed to place this stamp on all bills received at the White House after the President's departure and on all receipts for such bills (*ibid.*).

Prior to the President's departure on August 26, 1959, the President's Deputy Assistant for Congressional Affairs, Mr. Bryce N. Harlow, "discuss[ed] * * * the matter" with "Congressional leaders". The record, however, "does not disclose what was said in these discussions", or even which "Congressional leaders" were present, "since, as the President's agent, Mr. Harlow did not deem it proper at the trial to disclose the detail of the conversation" (Finding 8); nor is there any indication in the Record of any congressional action whatsoever taken pursuant to this "discussion."

Despite the instructions given by the President's aides to the White House staff as to the "Held for presentation * * *" stamp, the normal "Received" stamp was applied

9. On the contrary, it recited that the bill had been "presented to the President" on August 31, 1959 (Finding 6).

10. Deputy Assistant to the President.

11. White House Executive Clerk.

to H.R. 2717 on August 31, 1959. Upon discovering his error, the White House clerk who had receipted for the bill asked the cognizant House clerk to return the original receipt for restamping. When informed that the receipt had already been placed in the files of the Committee on House Administration, the White House clerk then asked that a piece of paper bearing the new stamp be attached to the original receipt; upon the advice of the Parliamentarian of the House, this was not done (Finding 9). And, as already noted, the House Journal states that H.R. 2717 was

> "on this day [August 31, 1959] presented to the President for his approval" (Finding 6).[12]

5. *Treatment of Other Bills During the President's Absence.* A total of 72 enrolled bills were delivered to the White House while the President was abroad (Finding 12). 70 of these bills were acted upon within ten days (Sundays excepted) from the time of such delivery (Finding 13).[13] One (S. 994) was approved twelve days after delivery to the White House (Finding 14), a mere surplusage if delivery was "presentation." The seventy-second bill was H.R. 2717. Accordingly, no other bill delivered to the White

12. The enrolled bill bears the stamp "PRESENTED TO THE PRESIDENT SEP 7 1959" (Finding 10); that stamp was affixed by a presidential clerk *after* the bill had been disapproved by the President on September 14, 1959 (Finding 17).

13. Whether or not one of these 70 bills, H. R. 6596, was acted upon within ten days is an open—although moot—question. If the bill was "presented" on September 3, the date of its delivery to the White House, it was subjected to a pocket veto on September 15. If it was "presented" on September 7, the date of the President's return, the purported "veto" of the bill by the President on September 16 may be valid (although Congress had previously adjourned). (see Finding 13n.)

House during President Eisenhower's absence presents the question raised in this case.[14]

Despite the President's "desire" that "so far as possible" bills be held in Washington, six bills delivered to the White House during his absence were in fact flown to him in Europe by his staff. One of these (H.J. Res. 510) was delivered to the White House two and a half hours after the delivery of H.R. 2717. It was signed in Paris three days later on September 3. Indeed, the President, while in Paris, on the same day vetoed S. 2539, which had been delivered to the White House only the day previous, September 2; the disapproved bill was returned to the Senate on September 4.

In addition, 23 bills which had been delivered to the White House before the President's departure on August 26, 1959 were also flown to Europe for action by him: in the view of the President's staff, "the President had but ten days from the date of delivery to the White House in which to act on the bills" since "the President was in the United States at the time the bills were delivered to the White House" (Finding 15).

Reasons for Granting the Writ

The Importance of the Question

One of the great debates of the Constitutional Convention of 1787 concerned the respective roles of the Congress and the President in the enactment of laws. Article I,

14. But, as the court below noted, the problem is likely to recur with increasing frequency. Opinion, p. 4.

Section 7, Clause 2 of the Constitution (set forth *supra*, pp. 2-3) embodies the resolution of that controversy.[15] Under that provision, bills become law in one of three ways:

(1) By passage by both Houses of Congress, followed by the approval of the President;

(2) By re-passage by a vote of two-thirds of each House of Congress after timely return to the originating House with the objections of the President;

(3) By the expiration of ten days (Sundays excepted) following presentation to the President of a bill passed by

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15. As to the history of the determination to grant the President a qualified rather than an absolute veto, see the following:

a. The Colonial Experience.

Fisher, *The Evolution of the Constitution of the United States* 17-18, 95-96, 161-167 (2d ed. 1910), hereinafter cited as *Fisher;* 4 Elliott, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 620-21 (1836); 4 Lincoln, *The Constitutional History of New York* 494-496 (1906), hereinafter cited as *Lincoln;* Bryce, *The American Commonwealth* 56-59 (3d ed. 1907); Beard, "Veto Power", *Cyclopedia of American Government* 613 (1914); Norton, *The Constitution of the United States* 41 (1940); 2 Baker, *The Fundamental Law of American Constitutions* 381 (1916).

b. The State Experience: 1776-1787.

N. Y. Const. (1777); Mass. Const. (1780); Warren, *The Making of the Constitution* 185 (1928); Farrand, *The Framing of the Constitution* 145-146 (1913); *Fisher* 17-18, 83-85, 95-96, 161-167; Dougherty, *Constitutional History of the State of New York* 51-52 (2d ed. 1915); Frothingham, *A Brief History of the Constitution and Government of Massachusetts* 94 (1916); 1 *Lincoln* 504-505, 554-555, 589; 4 *Lincoln* 494-496.

c. The Convention.

1 Farrand, *Records of the Federal Convention* 93-114, 138-44 (Rev. ed. 1937); 2 Farrand, *supra*, 73-80, 298-302, 563-64, 585-87; *Notes of Maj. Wm. Pierce*, printed in *The Formation of the Union* 93-94 (House Doc. No. 398, 69th Cong. 1st Sess.) (1927); *The Federalist*, Nos. 69, 73 (Hamilton).

both Houses of Congress, the President not having returned the bill to Congress with his objections and Congress not having adjourned within that period.

These methods have been considered by this Court on five occasions. As to the first method, this Court held that the President's approval was effective if given within ten days after presentation, although Congress was in temporary recess when approval was given. *La Abra Silver Mining Co.* v. *United States*, 175 U. S. 423 (1899). It was subsequently held that such approval was effective although Congress had, in the meantime, adjourned. *Edwards* v. *United States*, 286 U. S. 482 (1932). The second method was treated in *Missouri P. Ry. Co.* v. *Kansas*, 248 U. S. 276 (1919), in which this Court held that a timely veto could be overridden by a two-thirds vote of a quorum of each House, rather than of the entire membership. The other two cases involved the third method. In *The Pocket Veto Case*, 279 U. S. 655 (1929), it was held that the "adjournment" referred to in Section 7 included an interim adjournment between sessions, so that a bill did not become law by this method when Congress had begun such an adjournment less than ten days following presentation of the bill without the President having returned it. And in *Wright* v. *United States*, 302 U. S. 583 (1938), it was held that delivery of a bill with a message of disapproval to the secretary of the Senate while the Senate was in temporary recess constituted a valid "return" of the bill to the Senate, so that the bill did not become law by this method, such delivery having been made within ten days of presentation of the bill to the President.

While each of these cases involved, in one or another sense, questions of when the ten-day period for Presiden-

tial action was applicable, or of what constitutes effective Presidential action within that period,[16] none of them directly involved the equally important question of what action is constitutionally required to *begin* the ten-day period within which the President can effectively disapprove a bill while Congress is in session. In brief, this Court has not yet directly held what constitutes "presentation" of a bill to the President.

The question is of great importance, is directly presented by this case, and it should now be decided by this Court.[17] That it has historically been a matter of considerable doubt is reflected in the conduct and opinions of Presidents,[18] Congresses,[19] and Attorneys-General.[20] It is

16. The Court resolved these questions often only after decades of uncertainty. See, *e.g., Edwards* v. *United States, supra,* at 487-90. Thus, for example, William Howard Taft could write in 1916 that the President could not sign a bill after an adjournment of Congress, although he might do so during a recess. Taft, *The Presidency* 23 (1916). And, until 1932, Presidents customarily repaired to a special office at the Capitol to sign bills prior to Congress' adjournment.

17. See Anthony Lewis, writing on the instant case in The New York Sunday Times, Sec. 4, p. E7, cols. 2-4 (Oct. 25, 1964):

> "One of the astonishing things about this country's constitutional history is how long it has taken for some basic clauses of the Constitution to receive an authoritative interpretation from the Courts."

18. See, *e.g.*, Findings 21, 23 as to the conduct of Presidents F. D. Roosevelt and Eisenhower; see also Finding 22 n. 32 as to such doubt on the part of the State Department.

19. See, *e.g.*, Remarks of Senator Keating, 105 Cong. Rec. 19553-54 (Sept. 14, 1959), reprinted in Appendix C, *infra*; Zinn, *The Veto Power of the President,* 12 F. R. D. 207, 220-24 (Report of Law Revision Counsel to the Committee on the Judiciary of the House of Representatives) (1951), concerning the "inadequacy" of this Court's interpretations of Section 7.

20. See, *e.g.*, Memorandum of Attorney-General Biddle dated November 10, 1943, set forth in Finding 21; Memorandum of Attorney-General Brownell dated July 5, 1955, Plaintiff's Exhibit 3, set forth in Appendix C, *infra,* p. 5a.

a question which is likely to arise with increasing frequency, as the Court below noted:

> "If the recent past is indeed a prologue, the question cannot be dismissed as transient. The combination of increased presidential mobility and concern with foreign affairs together with prolonged congressional sessions is likely to result in a recurrent pattern of presidential travel abroad even while Congress is sitting. The problem will doubtless endure." Opinion, p. 4.

See also *Wright* v. *United States, supra,* where on analogous facts, certiorari was granted "[i]n view of the importance of the question" (302 U. S. at 586). It is submitted that the question presented in the instant case—the reciprocal to that in *Wright*—is no less important.

The Rationale of the Decision Below: The President's Qualified Right Unilaterally to Demand Personal Presentation

The decision of the court below cannot be regarded as authoritatively settling the question. Among other things, it appears to us to be at variance with expressions of this Court in *Wright* v. *United States, supra,* as to which, see *infra,* pp. 21-23. Moreover, to the extent that the decision below *is* treated as defining the constitutional requirements, it enunciates a constitutional test incapable of sure and certain application by reference to official and public records, so as inevitably to raise doubts as to whether particular Acts of Congress have indeed become Laws of the United States.

The court below said, and we agree, that any construction of Section 7 must be tested in terms of "eras of

hostility, coolness, partisan tactics or simple lack of concern," rather than in terms of periods of cooperative understanding as between the Executive and Legislative branches. Opinion, p. 8. For this reason, among others, the failure of the court below to provide a clear and certain constitutional test, so that the constitutional status of bills may readily be ascertained during such times, demonstrates that its construction of Section 7 is not viable.

Holding that delivery of H.R. 2717 to the Office of the President at the Seat of the Government by an agent of the Congress on August 31, 1959 in accordance with time-honored procedure did not constitute "presentation" of the bill to the President within the meaning of the Constitution, the court adopted as its central propositions: (i) that personal presentation to the President is not required by Section 7;[21] but (ii) that the President is constitutionally empowered to demand such presentation. In the court's view, the President may, at his sole option, either "insist that bills be presented to him personally", or "dispense with personal presentation and accept bills through some other procedure." Opinion, p. 9.

In fact, as the court found, "some other procedure"—consisting of delivery to the Office of the President in the White House at the Seat of the Government in Washington, D. C.—has obtained, without variation, for at least the past forty years (Finding 6). This "other procedure" was followed as to H.R. 2717 precisely as it has been as to countless other bills over the years (*ibid.*). Having, however, postulated that the President had the power uni-

21. The court could not comfortably have held otherwise, since delivery to the White House has generally been treated as "presentation" since at least 1931 (Finding 5).

laterally to terminate this "other procedure", the court went on, *ex necessitate*, to qualify the conditions of its exercise. Thus the court held:

> (a) that as a prerequisite to his exercise of this power, the President must have informed Congress "in some manner" that the "other procedure" had been terminated and that personal presentation would thenceforth be required.[22] Opinion, p. 9.

Once the President has so informed Congress, said the court, Congress is obligated to present bills to him personally. But the court further limited this requirement

> (b) if personal presentation is demanded, the President must make himself "reasonably available" for such presentation. Opinion, pp. 9, 10, 11n.

Additionally, the presentation required is not truly personal, since the court added:

> (c) that an "equivalent" to personal presentation would be "delivery to an aide in the immediate vicinity of the President." Opinion, pp. 9, 10, 11n.

The opinion of the court below does not in terms limit the right of the President to demand personal presentation to those occasions when the President is abroad,[23] and,

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22. It is, of course, apparent that, absent some such limitation, the President could defeat all Congressional efforts to present bills to him according to a traditional method by a private, uncommunicated resolve to terminate the practice.

23. The President's staff, however, have invariably treated delivery to the Office of the President while he is in the country as presentation, although he may be far from the Seat of the Government. Findings 15, 23. The court below characterized this practice as merely "precautionary" rather than "determinative". Opinion, p. 12. In the court's view, the President can demand personal presentation "if he wishes" (Opinion, p. 9), "when he feels it important" (Opinion,

indeed, we see no rational basis for so limiting his power, once it is granted that some such power exists. Neither the terms of the Constitution nor the opinion below conditions the exercise of presidential power in general, or specifically his power to receive, approve or disapprove bills, upon the personal *locus* of the President (*cf.* Opinion, p. 6 and authorities there cited): indeed, the President received, approved and disapproved bills while abroad on the trip in question. Nor can distance *per se* justify the creation of a constitutional power in the one instance and not in the other: when the President is in Paris he is closer to Washington than when he is in Honolulu.[24]

Delivery of Bills to the President's Office at the Seat of the Government Constitutes Adequate "Presentation."

The ten-day proviso of Section 7, limiting the President's power to disapprove a bill while Congress has not yet adjourned, is found at the end of the Section, after the provision giving Congress the power to override a presidential veto. The Constitution having conferred on the President only a qualified, and not an absolute veto, the purposes of the ten-day limitation are clear enough: to deprive the President of the power to delay the effective-

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p. 11), or whenever the traditional system "becomes inconvenient or burdensome to him" (Opinion, p. 10).

Article II, Section 1, Clause 5 provides that the Office of the President shall devolve on the Vice President in case of the President's "Inability to discharge the Powers and Duties" of the Office. It has not yet been suggested that the President's absence abroad incapacitates him from discharging his powers and duties to receive bills and to act upon them in accordance with Section 7.

24. Bills delivered to the White House during President Eisenhower's 1960 Far East visit were stamped "Presented to the President" as of the day he landed in Hawaii on his return (Finding 23).

ness of laws beyond the allotted period without affording Congress the opportunity by an appropriate vote to make its bills into laws despite the President.[25] Story, *Commentaries on the Constitution of the United States* §891 (5th ed. 1891); Black, *Handbook of American Constitutional Law* 122 (4th ed. 1927). Moreover, the time limitation has the very practical effect of limiting the time the President may force Congress to remain in session. For if the President could effectively delay the return of bills, Congress would have to remain in session to receive his messages of disapproval, however long delayed, or surrender its power to override his veto.[26]

The question presented by the rationale of the decision below is thus whether the President can, by absenting himself from the Seat of Government and by demanding personal presentation, require Congress, if it is to preserve its power to enact laws over Presidential veto, to remain in session for the additional period physically required to effect personal delivery in some other part of the world. The constitutional question arises in the present case in the context of modern, instantaneous communication, and

25. One of the central complaints articulated in the Declaration of Independence was the Crown's neglect to attend to laws presented for his approval, and consequent suspension of their effectiveness.

26. The significance of this element of delay is apparent in this case. The President returned to the United States on September 7, and Congress adjourned at 6:22 a.m. on September 15. If bills were not deemed presented until the President's return, Congress could have been required to stay in session until after September 18 in order to insure itself an opportunity to override his vetoes.

The Houses of Congress determine the date of their adjournment, except in case of disagreement between the two Houses, in which case the President decides. U. S. Const. art. I, §5; U. S. Const. art. II, §3.

relatively easy and rapid transportation. The governing constitutional clause, however, was written when communication and travel were slow, inconvenient, and unreliable, and when it was simply not to be thought of that the President might be in Europe while Congress was in session. That the Framers did not adopt any principle of "personal presentation" of Congressional bills to the President while abroad is evident enough from this: that a bill "personally presented" to the President in London or in Paris in 1789 and immediately acted upon by him could not, in those days, *physically* have been "returned" to the Congress by the fastest means then available within the ten days allotted after presentation.

The truth is that the notion of "personal presentation" of bills to the President while abroad during a Congressional session was simply inconceivable under 18th Century conditions, while such a doctrine is entirely unnecessary under modern conditions. [27] And, we submit, the principle that the President may leave the Seat of the Government and the country during a Congressional session, and require the Congress to send messengers after him to effect presentation of bills, leaving the risks and delays of such delivery with the Congress, not the President, is not in keeping with the narrowly circumscribed powers over legislation conferred upon the Executive.[28] We submit that the purposes and structure of the clause

27. See p. 11, *supra*.

28. We may wonder at the prospect of the Congress applying to a foreign Government for a visa to permit Congress' messenger to enter the territory of that Government for the purpose of effecting presentation of Acts of Congress to the President while in that country.

are best served by a construction which holds that delivery of bills by Congress to the Office of the President at the Seat of the Government is "presentation" to the President, though the President be temporarily absent.

In *Wright* v. *United States*, 302 U. S. 583 (1938), this Court held that the President had effectively "returned" a disapproved bill to the originating House within the meaning of Section 7, prior to the expiration of ten days following its presentation, by delivering it to the secretary of the Senate, notwithstanding that the Senate itself was then in recess. Holding that Congress could not frustrate the President's power to "return" a bill within the prescribed time by going into temporary recess, the Court analogized the "return" to the very situation at bar—the presentation of a bill to the President during his absence from the White House:

> "There is no greater difficulty in returning a bill to one of the two Houses when it is in recess than in presenting a bill to the President by sending it to the White House in his temporary absence. Such a presentation is a familiar practice." 302 U. S. at 590.

Just as *Wright* held that Congress could not by its recess defeat the President's right effectively to *return* a bill within the ten-day period allotted, we submit that the President may not by his absence from the Seat of the Government frustrate or delay Congress' right effectively to *present* a bill, so as to begin the ten days' running.

The court below distinguished *Wright* solely on the basis of the reference in *Wright* to the secretary of the Senate as the Senate's "accredited agent" (see Opinion,

p. 14, n. 17); in this case, however, it found the President's legislative clerk not so "accredited", his "authorization" having been revoked. But the secretary of the Senate was only *constructively* deemed in *Wright* to be "accredited" for the purpose of receiving bills, in order to effectuate the President's constitutional right to return bills to the Senate during its recess. As the concurring opinion in *Wright* points out (302 U. S. at 599-600), there was nothing in the majority opinion to indicate that the Court was relying upon any actual "authorization" of the secretary by the Senate to receive the return of bills during its recess; or that the secretary was the Senate's "agent" in any general or private sense.

The principle for which petitioner contends, and which *Wright* supports—that delivery of bills to the President's Office is "presentation"—leaves adequate room for practical arrangements to be made, with the concurrence of the Congress, to adapt the law-making process to necessary presidential absence from the Seat of the Government. As at least two Attorneys-General have suggested,[29] the officers and committees of the Congress may, at the request of the President, withhold the signing or delivery of bills to the White House and so delay their presentation under Section 7, if the *Congress* is persuaded that presentation should be thus delayed.

We think that the power to delay presentation when the President is absent must reside in Congress, rather than, as the lower court concluded, in the President, since the ten-day clause is intended to be a limitation upon the Presi-

29. Memoranda of Attorneys-General Biddle and Brownell, *supra*, p. 14 n. 20.

dent's power, and since it is the President who decides whether or not he will be absent. And just as the President must be able to fix the date of return, regardless of Congress' temporary absence, to prevent Congress from *limiting* his power of qualified veto (*Wright* v. *United States, supra,* 302 U. S. at 596-97), so Congress must be able to fix the date of presentation to prevent the President from *expanding* his power of qualified veto.

The Constitutional Scheme Envisioned by the Decision Below is Uncertain and Unworkable

If the writ is granted, petitioner will argue that the only principle which workably fulfills the constitutional scheme is that Congress may at any time "present" bills to the President under Section 7 by delivery to his Office at the Seat of the Government. The alternative constitutional scheme envisioned by the court below makes it uncertain whether particular Acts of Congress have been "presented" in accordance with Section 7 when the President is absent from the Seat of the Government. This result follows ineluctibly from the conditions and qualifications which the Court found necessary to place on its basic principle that the President can unilaterally demand personal presentation.

Recognizing that an unlimited unilateral power to demand personal presentation would permit the President to stop the law-making process by the expedient of making himself unavailable for personal presentation and would be wholly inconsistent with the constitutional scheme, the court below imposed several additional limitations: the President must make himself "reasonably available" for personal presentation; Congress may deliver bills to an

"aide in the immediate vicinity" of the President as the "equivalent" to personal presentation; and the President must "inform" Congress in some way that he requires personal presentation. See Opinion, pp. 9, 10, 11 n. In so limiting its principle of personal presentation, the court below has only substituted the inescapably uncertain for the absolutely unthinkable.

A. "Reasonably available." If the Constitution imposes an obligation on the President to make himself "reasonably available" for the presentation of bills, two questions immediately suggest themselves:

1. What is "reasonably available"?

2. What follows if the President is *not* "reasonably available"?

That the Court of Claims answered neither question is not surprising. A general standard of "reasonableness" requires *ad hoc,* after-the-fact decision in litigation in cases concerning the effectiveness of particular Acts of Congress. It is, for this very reason, unsatisfactory as a principle for determining whether and when bills have been "presented" to the President. The country should not have to wait for a court to decide whether the President's unavailability in a given instance was "reasonable" or "unreasonable" under all the circumstances before it knows whether a particular Act of Congress has become law.[30]

30. *Quaere,* whether the question of the President's "reasonable availability" would not be a question of fact for a jury in private litigation (to which the United States would not necessarily even be a party), determinable by reference not only to the physical accessibility of the President, but also to the Presidential commitments which made it necessary for him to be physically inaccessible for varying periods.

And if the President fails to make himself "reasonably available" for presentation of bills, may Congress *then* deliver such bills to the Office of the President at the Seat of the Government? Does the ten-day period then begin on the first day the President is found to have made himself "unreasonably unavailable"? All these preliminary questions—akin to questions of personal service in private litigation—could cast in doubt the very existence of laws, once one accepts the notion that the President may declare that a formal, institutional delivery of bills to his Office shall not constitute "presentation."[31]

B. Informing the Congress. Having found that to alter the customary procedure of "presentation" by delivery to the President's Office, the President must "inform" the Congress that he requires "personal presentation", the Court concluded that Congress was adequately informed in this case:

> "The Congress was informed of this procedure [that bills would be held by the White House staff until the President's return] by a Presidential aide before the President departed." Opinion, p. 14.

The conclusion and the evidence upon which it was based dramatically demonstrates the unworkability and error of the lower court's qualified principle of personal presentation.

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31. Finding that an "equivalent" to actual personal delivery to the President is "delivery to an aide in the immediate vicinity of the President" (Opinion, p. 9) seems to us incompatible with the underlying principle that the President may revoke the authority of his Office at the seat of the Government. If the court holds that a constitutionally irrevocable authority exists for presentation to aides in the President's vicinity, why does not a similar constructive authority exist at the permanently fixed Seat of the Government (see U. S. Const. art I, §8, cl. 17) where bills have traditionally been presented to the President?

For there is no *official* document or record of any Presidential action either (a) informing Congress that bills had to be delivered to him personally during his trip in order to effect presentation, or (b) declaring that H.R. 2717 was not "presented" to the President when delivered to his Office on August 31, 1959, other than a stamp placed upon the enrolled bill by the President's Office *after* the ten days following delivery to his Office had already expired (Finding 17). No message was sent to Congress reflecting the President's alleged decision that delivery to his office would not be "presentation" (*cf.* Memorandum of F. D. Roosevelt dated November 10, 1943, reprinted in Finding 21). No Public Proclamation or Executive Order was published in the Journal of either House, in the *Congressional Record* or in the *Federal Register*. The official Journal of the House and the *Congressional Record* indicate to this day that H.R. 2717 was "presented" to the President as of the date of its delivery to his Office (Finding 6). And, when the Senate was informed of the President's veto message on the eve of its adjournment, on September 14, 1959, one Senator inquired whether it had not already become law (Appendix C, *infra*, pp. 6a-8a) as the official Journal entries showing presentation on August 31 indicated; he was advised that whether or not it was a law was now a question for the courts.

When the issue did come to court, we find that, according to the decision below, the question of whether the bill is a law depends not upon official records but upon oral testimony by a former Presidential aide concerning a "discussion" between himself and some "Congressional

leaders."[32] Who those "leaders" were, and whether they were in fact the Congressional leaders from the President's (minority) party was not disclosed. Nor was it disclosed what was *said* in that "discussion", since the aide refused to divulge such information at the trial on the grounds that he was acting as a Presidential agent (Finding 8).

In sum, the constitutional precept announced by the Court below contemplates that whether or not an Act of Congress was "presented" to the President, and whether or not it became law, shall depend, not upon official records, but upon how far present or former presidential aides, will go, years after the fact, to disclose the details of conversations with "Congressional leaders", and how far they can successfully invoke claims of official secrets. Only thus, it seems, are we to discover whether Congress was "informed" that formal delivery of bills to the White House was no longer to be deemed "presentation", and consequently whether a particular bill which, according to all *public* records, was "presented" to the President on a certain day was in fact "presented" on that day. The uncertainty and possible abuse to which such a principle can be subject need not be dwelled upon. If anything is clear, it is that some better principle is required to determine whether an Act of Congress has been "presented" to the President.[33]

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32. Since the question of whether an Act of Congress has become a law may arise in cases to which the United States is not a party, such testimony may be given without the Government being represented.

33. *The Pocket Veto Case, supra,* is replete with concern that publicity and certainty attend all phases of the process of the return of a bill to Congress. See 279 U. S. at 684-685. In *Wright,*

The "Ground" of Congressional "Acquiescence"

The court below, having stated its interpretation of Section 7 in Part I of its Opinion, went on to conclude in Part II that Congress had acquiesced in the President's decision that bills delivered to the White House would be received "only for presentation to him upon his return to the United States." It is apparent, however, that the court's reference to Congressional acquiescence did not purport to provide an independent ground of decision. On the contrary, the court's reference to "acquiescence" follows the statement in the same paragraph at page 14 of the court's opinion that:

> "[The President] was free to decide, as he did, that during his absence bills would be received at the White House only for presentation to him upon his return to the United States."

Congressional "acquiescence," in the court's own reasoning thus turns on the main question at issue: whether the President had the unilateral power under the Constitution to determine that bills delivered to his office were not "presented" to him. Indeed, this is made even clearer by the act which the court found to constitute Congressional acquiescence:

> "The Congress, if it did not agree, could have sent the bills to the President in Europe. But it did not

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supra, the Court distinguished *The Pocket Veto Case* by noting that return during a three-day recess of the Senate does not result in "keeping * * * the bill in a state of suspended animation with no certain knowledge on the part of the public whether it was seasonably delivered. * * *" 302 U. S. at 595. It is, of course, apparent that the procedure which the Court found adequate in this case for the President's "informing" Congress of a requirement of personal presentation results in precisely the uncertainty which so concerned this Court.

take that course. * * * *By failing to take the one step which would have had that effect* [of "accelerating" presentation]—*sending the bill abroad through its own messenger—the House must be taken to have acquiesced in the President's new arrangement.*" Opinion, p. 14 (emphasis added).

But the act which the Court suggested would evidence *non*-acquiescence by Congress—personal presentation by Congressional messenger to the President abroad—would appear rather to evidence Congressional *acquiescence* in the President's right unilaterally to demand personal presentation. *Non*-acquiescence in the President's assertion of power to demand personal presentation would seem more clearly evidenced by a refusal to deliver bills abroad and a continuation of the policy of delivery to the President's Office.

The proposition that Congress could have "accelerated" presentation by sending bills abroad, and that Congress accordingly acquiesced by not so "accelerating" presentation is obviously grounded upon the assumption that delivery to the White House does not constitute presentation when the President has so declared. Since that proposition assumes the power in dispute, it does not constitute a separate ground of decision.

Conclusion

Whether or not a bill has been "presented" to the President within the meaning of the Constitution requires a rule which is both simple and certain in its application, and compatible with the general scheme of the Constitution. A rule that the President may, without limitation,

require personal presentation is not compatible, as the court below itself concluded, with the basic constitutional scheme limiting his veto power. A presidential power to require personal presentation, with the qualifications proposed below, may be less at variance with the basic scheme, but only at the price of introducing inadmissible uncertainties as to whether the qualifying conditions have been met. The only principle consistent *both* with the intention of the Framers and with the need for clarity and certainty is that delivery of bills by Congress to the Office of the President at the Seat of the Government constitutes "presentation" within the meaning of the Constitution, and that the President may not unilaterally require some other mode of presentation.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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